IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 17TH JULY 2007 / 26TH ASHADHA 1929

CRL.A.No. 876 of 2007()

SC.1548/2005 of SPL.COURT FOR TRIAL OF OFFENCE U/A 33/1989, THALASSERY

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APPELLANT:

KUNNATH BABY @ ESTHAPPAN
C.N.4610, CENTRAL JAIL
KANNUR

BY ADV. K.SANIL KUMAR[STATE BRIEF]

RESPONDENTS:

STATE OF KERALA
REPRESENTED BY ITS PUBLIC PROSECUTOR
HIGH COURT OF KERALA

BY PUBLIC PROSECUTORSRI. PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.876 OF 2007- D

Dated this the 17th day of July, 2007.

JUDGMENT

The sole accused in S.C.No.1548/2005 on the file of the Special Judge, Thalassery is the appellant. The appellant faced trial for the offences punishable under Sections 376, 379 and 3(1)of SC/ST (Prevention of Atrocities Act), 1989. The prosecution case against the appellant was that on 27.6.1999 at 5 p.m while PW4 was returning from the house of her sister, the appellant stopped her at the way and he caught hold of her from behind and committed rape on her. The further case of the prosecution was that the appellant had stolen an amount of Rs.500/= which PW4 kept in her dress. PW4 belongs to SC/ST community. The appellant had committed the offences against PW4 punishable under Section 3 of the SC/ST (Prevention of Atrocities) Act also. To prove the case against the appellant, prosecution examined Pws 1 to 12 and produced Exts.P1 to P16. MOs 1 to 3 were also produced. After closing the prosecution evidence, the appellant was questioned under Section 313 of the Code of Criminal procedure. Denying the prosecution allegation, the appellant had stated that he is innocent. Further he had stated before

the court that he had consumed alcohol from PW4 and paid Rs.100/=. As the balance of Rs.40/= has not been returned, there ensued a quarrel between PW4 and himself and because of this, the case was foisted against him by Pws 1, 5 and the father of PW4. Exts.D1 and D2 were also marked on the side of defence. However, after considering the entire evidence, the trial court found the appellant guilty under Section 511 of 376 and he was convicted thereunder and sentenced to undergo R.I for 4 years and to pay compensation of Rs.25,000/=and in default of payment of the compensation, to undergo S.I for a term of three months more. The above judgment of the trial court is assailed in this appeal.

2. Since the appeal is filed through the jail authorities and the appellant is not having a counsel of his own choice to argue the case, a member from the State brief panel has been appointed to argue the case for and on behalf of the appellant. This Court heard the learned counsel appearing for the appellant and also the Public Prosecutor appearing for the State. The learned counsel appearing for the appellant had taken the following contentions for challenging the judgment of the trial court. Firstly it is contended that the trial court

committed a serious error in finding the appellant guilty under Section 511 of Section 376 only on the basis of the evidence of PW4 as there was no supporting evidence or corroborative evidence to prove the case against the appellant. Secondly, it is contended that even if the evidence of PW4 is accepted as the evidence of a prosecutrix, the finding of the trial court that the appellant had committed an offence punishable under Section 511 of 376 is not justifiable. Finally it is contended that as the prosecution case set up against the appellant for the offence punishable under Section 379 is not proved on the basis of the evidence adduced by PW4 and on the basis of the infirmity in the evidence of the investigating officers, the case against the appellant is also not justifiable. Lastly it is contended that the punishment awarded against the appellant is excessive.

3. The trial court relied on the evidence of Pws 1 and 4 to prove the charge against the appellant. As per the evidence of PW4 it is seen that she was gone to the house of her sister early morning on the day of the incident and she was returned from the house of her sister in the evening . When she reached the shop of Subash, the appellant was seen there and on seeing PW4, the appellant went

ahead along the way which PW4 also has to go. This witness has further stated that when she went along the way she had seen that the appellant was waiting on a rock and when she reached near the appellant she was perplexed. But the appellant told her to proceed and she need not be afraid of him and hence, PW4 passed the accused, immediately the appellant caught hold of her from behind and lift up the nighty and under skirt from behind and he appellant committed rape on PW4. PW4 has further stated that the appellant committed rape on her body from behind for ten minutes and thereafter she was left free. She had narrated the way in which the appellant committed rape on her. She had further stated that she lost Rs.500/= in the midst of the incident and she believed that the amount was taken by the appellant. Further evidence of this witness was to the effect that after releasing her by the appellant she went to the house of PW1 and reported the matter and PW1 had told her that he would compromise the matter after having a talk with the appellant. So she waited. Thereafter she waited up to 6.7.1999 and it was found that PW1 had not intervened in the matter and had not compromised the matter, she went to the Kudiyanmala Police Station and filed Ext.P4 statement

before the police. On the basis of which, a crime was registered against the appellant. This witness has further stated that as directed by the police she has gone to the hospital and she was examined by PW9 on 6.7.1999. This witness has further stated that she had reported the matter to PW5 also who helped her to file a complaint before the police.

4. The evidence of PW1 was accepted by the trial court as corroborative evidence of PW4. The trial court considered the evidence of PW9 the Assistant Surgeon of the Disitrict Hospital, Kannur who examined PW4 on 6.7.1999. PW9 had stated that she had examined PW4 on 6.7.1999 and had issued Ext.P8 medical certificate. According to this witness, she had not noted any stain of blood or semen. No grass or hair. No abrasions or contusions of face, back of shoulders, arms or things of PW4. But this witness has also stated that there was no general body injury on the external genitalia. Though there was an injury noted, which was a heeling injury having 3 to 7 days of age. This witness has also proved in Ext.P9 chemical report the dresses worn by PW4 at the time of the incident. As per Ext.P9 report it was reported that none of

the dresses alleged to have worn by PW4 at the time of the incident contained semen or spermotozoa and hence the prosecution failed to prove that the appellant raped PW4. However, considering the evidence adduced by the prosecution, the trial court found that the evidence of PW4 and PW9 postulates a case of attempt of rape by the appellant on PW4. The trial court also relied on the evidence of PW1 to find that the he helped PW4 for reporting the assault made on PW4 by the appellant on the day of the incident to the police. The other witnesses examined by the prosecution are only formal witnesses and PW10 is the investigating officer, who conducted investigation of the case and seized material objects on preparing certain mahazers. All these mahazares were attested by Pws 5, 6 and 7. Though these witnesses had stated before the court that they have seen some amounts were recovered from one Gopi- PW8, that evidence was not accepted by the trial court. Relying on the evidence of Pws 1, 4 and 9 the trial court found the appellant guilty of an offence punishable under Section 511 of 376. The question to be decided in this appeal is whether the judgment of the trial court is justifiable or not. In this context it has to be noted that even in Ext.P4 statement given by PW4 before the police she had a case that the

appellant committed rape on her in a standing position and from behind. When she was examined before the court she had narrated the way in which the appellant committed rape on her. According to her, she was made bent of her body by the appellant and after removing her skirt and nighty the appellant committed rape on her from behind the body. In this context, the evidence of PW9 is relevant. When PW9 was cross examined, she had stated that it was not possible to have a sexual intercourse from behind without the consent of a victim. This witness though had stated that she was not in a position to say whether rape was committed or not on PW4 but, the evidence of Pws 4 and 9 were accepted by the trial court to find that the appellant had attempted to commit rape on PW4. In this context, it has to be noted that as per the evidence of PW4 when she was going along the pathway, the appellant was waiting on a rock and when she reached the appellant she was in a perplexed move and thereupon the appellant asked her to pass through and at that time immediately the appellant caught hold of her from behind and attempted to commit rape. In this context, the trial court correctly analysed the evidence of PW9 and came to a conclusion that there was no evidence for rape but the question is

that what was the actual offence committed by the appellant against PW4. In this context PW4 had stated to PW1 that the appellant waylaid her and assaulted her. The learned trial judge though considered this aspect in paragraph 37 of the judgment to the effect that version of PW4 with regard to the narration of the commission of rape was embellishment , the trial court without considering the above aspect of the evidence of PW4 came to the conclusion that there was an attempt for committing rape by the appellant. But on analysing the evidence of PW4 and PW9, it can be seen that the appellant had committed only an offence punishable under Section 354 of I.P.C as the appellant molested PW4 and had outraged the modesty of PW4. If so the finding of the trial court that the appellant had committed the offence punishable under Section 511 of 376 is not justifiable and it has to be set aside.

5. In the above circumstances, on taking the entire evidence adduced by the prosecution, this Court is of the view that the finding of the trial court that the appellant had committed an offence punishable under Section 511 of 376 is not justifiable and that finding is set aside. Instead it is found that the appellant

had committed an offence punishable under Section 354 of I.P.C. Admittedly, PW4 was a woman of 33 years at the time of the incident and she is having three children and her husband was also away from her more than six years. In the above circumstances, the version given by PW4 regarding the attempt made by the appellant for the commission of the offence punishable under Section 376 is not justifiable. However, this Court finds that the appellant had committed an offence punishable under Section 354 of I.P.C. Accordingly, the appellant is found guilty under Section 354 and convicted thereunder and sentenced to undergo R.I for two years. It is also ordered to pay compensation of Rs.10,000/= under Section 457(3) of the Code of Criminal Procedure to PW4. If the compensation is not paid as aforesaid, the appellant shall undergo S.I for a further period of three months.

Accordingly, the appeal is allowed in part

K. THANKAPPAN, JUDGE.

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K. THANKAPPAN, J.

CRL.A.NO.876 OF 2007

JUDGMENT

17th July, 2007.